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CITATIONS

518384—43——1

Cases—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 792

MAX STEPHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (2 R. 14–37) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 6, 1943 (2 R. 14). The petition for a writ of certiorari was filed March 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment properly charged that the defendant had committed treason; and, if so, whether the evidence was legally sufficient to support the verdict.

2. Whether there was any error in connection with the testimony of the German officer Krug, either by reason of his alleged incompetency as a witness, or by reason of his conduct in the courtroom, or by reason of his refusal to answer certain questions.

3. Whether there was prejudicial error in the admission of various items of evidence, asserted to be irrelevant, incompetent, or obscene.[1]

4. Whether there was any impropriety in the United States Attorney's closing argument to the jury.

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[1] Those items of evidence were as follows:

(a) The so-called Von Werra matter, which consisted of a conversation between the German officer Krug and one Donay in the presence of the defendant, with respect to a German aviator, Von Werra, who had apparently been released on bail and who had escaped to Germany.

(b) The testimony of witnesses Ludlow and Merrifield with respect to the defendant's efforts in procuring the services of the prostitute Merrifield on behalf of Krug.

(c) The testimony of the Federal agent Parker with respect to Krug's apprehension at San Antonio, Texas, and the introduction as exhibits of various articles, such as a pistol, cartridges, etc., in the possession of Krug at the time of his arrest.

(d) A signed statement made by the defendant at the time of his arrest.

5. Whether the judge's charge to the jury defined the crime and the nature of the requisite proof with sufficient clarity and precision.

6. Whether, in the circumstances of this case, the jury should have been sequestered.

7. Whether the death sentence is so disproportionate to the offense as to deprive the defendant of any rights.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution, Article III:

> SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

United States Code, Title 18:

> *Section 1. (Criminal Code, section 1.) Treason.* Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. (R. S. § 5331; Act of Mar. 4, 1909, c. 321, § 1, 35 Stat. 1088.)

Section 2. (*Criminal Code, section 2.*) *Same; punishment.* Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than $10,000, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States. (R. S. § 5332; Act of Mar. 4, 1909, c. 321, § 2, 35 Stat. 1088.)

STATEMENT

Petitioner was found guilty under an indictment charging him with treason (1 R. 342), and he was sentenced to death by hanging (1 R. 25–26, 362). The Circuit Court of Appeals affirmed the judgment (2 R. 14).

The indictment.—The indictment was in one count. It alleged that the defendant, a citizen of the United States, in violation of his duty of allegiance to the United States, wilfully and treasonably adhered to Peter Krug, a member of the German armed forces who had escaped from a military war prisoner's camp in Canada, giving him aid and comfort in the city of Detroit, Michigan, on April 18 and 19, 1942; that such aid and comfort consisted in receiving and treating

with Krug, in furnishing hospitality to him, in obtaining money, necessities of life, and personal effects for him, in concealing his identity, and in arranging for his transportation in and about Detroit and from Detroit to Chicago. The indictment further charged that in adhering to Krug, giving him aid and comfort, as aforesaid, the defendant wilfully and treasonably performed twelve enumerated overt acts [2] (R. 1 R. 1–5).

The evidence.—The principal witness for the Government was Peter Krug (1 R. 52–116), an officer in the German air force. In August 1940, Krug was in command of a bomber flying over England and was shot down (1 R. 52). He was captured, hospitalized, and sent to a prison camp in Canada (1 R. 52–53). In April 1942 he escaped (1 R. 53, 117). During the course of that escape he appeared, at nine o'clock in the morning of Saturday, April 18, 1942, at the doorway of the witness Margareta Bertelmann, in Detroit (1 R. 55, 166). She was a native and citizen of Germany (1 R. 175). She had sent food and clothing to German prisoners in Canada and in so doing had been required to write her name and address on those packages (1 R. 174–175). To her Krug immediately revealed his identity

[2] The overt acts are numbered from 1 through 13, but there is no overt act 6. Moreover, after the evidence had been submitted, the District Court ordered that overt act 10 be stricken (1 R. 10, 246–257, 261–263). Thus, at the time the case was submitted to the jury, there were eleven overt acts alleged in the indictment.

(1 R. 55, 166–167). Conscious of guilt in harboring him, she became apprehensive (1 R. 167, 182–184), and telephoned for the defendant Stephan, her friend (1 R. 167). Shortly after she had reached him on the telephone, Stephan arrived at her home (1 R. 58, 167).

Stephan was a native of Germany, admitted to citizenship of the United States on June 24, 1935 (1 R. 49–50; Ex. 1–C). He owned a restaurant in Detroit. Until the declaration of war by Germany against the United States, Mrs. Bertelmann frequented that place with other women who met there to knit clothing for German prisoners. (1 R. 174.)

To Stephan, too, Krug admitted his identity and that he had escaped (1 R. 58–59, 168). Stephan told him to "give up", that he did not have "a chance" (1 R. 168). Krug insisted that he had to make an effort (1 R. 168). He felt that he had to inform the German Government about conditions at the Canadian camp, and he wanted to get back to Germany to do his "duty again" (1 R. 64–65, 101, 168).

At Stephan's suggestion, Mrs. Bertelmann gave Krug underwear, socks, and shoes (1 R. 60, 169); Stephan asked her for money and she put twenty dollars on her kitchen table (1 R. 169, 170). There is some uncertainty as to whether she or Stephan gave that money to Krug but no doubt that Krug got the money (1 R. 60, 169–170, 285–

286). On leaving Mrs. Bertelmann, Stephan escorted Krug to his car which was parked outside of her house (1 R. 61, 171). Then Stephan took Krug to his restaurant and as they left the car Stephan told Krug to turn the corner and enter through the front door. Stephan entered through the rear. Their meeting would have seemed fortuitous to anyone inside. (1 R. 61–62.) Krug entered, sat down at a table, and Stephan provided him with a meal (1 R. 62).

Stephan then said that he was busy, and Krug took a walk, returning in mid-afternoon (1 R. 62). Stephan gave Krug a tie and a wallet, and they took a trip about Detroit together during the remainder of the afternoon (1 R. 63–64). Stephan bought a light travelling bag and gave it to Krug (1 R. 66).

They went to a restaurant, Haller's Cafe, and there the two had whisky and beer (1 R. 66, 128). The proprietor, Haller, told Stephan that he was reluctant to serve Krug; he thought he was not of age. Stephan told Haller that Krug was one of the "Meyers boys" and he knew he was of age. (1 R. 129.) Stephan paid for the drinks (1 R. 130, 67). Another incident fixed the occurrence in Haller's memory. Stephan and his guest had two bags with them when they entered. They forgot them at Haller's bar when they left. But a few minutes later the "Meyers boy," as Haller called Krug in his testimony, returned and took them (1 R. 130, 67).

During the afternoon Stephan called on the witness Lenz, from whom he regularly bought crockery (1 R. 126, 65). He asked Lenz to call the railroad station and inquire about train departures to Chicago. Lenz learned that the only train that afternoon left at four o'clock. (1 R. 127.) When Stephan rejoined Krug he told him that he could not reach the station in time for that train (1 R. 224).

Later in the afternoon both men went to another restaurant, referred to as the Progressive Hall, or the Progressive Club. (1 R. 67, 122–124).

Later, Stephan took Krug to the place of business of his friend Theodore Donay, a Detroit merchant. Donay was informed that Krug was the escaped German flyer. (1 R. 68–69, 195.) There was talk about another German soldier, Von Werra, who had escaped and had returned to Germany (1 R. 70–73). Donay gave him twenty dollars (1 R. 69, 196–197, 286).

Some time during the afternoon Stephan took Krug to a house on Duffield Street in Detroit where Krug testified he "saw" a "woman" (1 R. 67). Two witnesses, Mrs. Ludlow and Mrs. Merrifield, testified to their presence there (1 R. 185, 190–191). On cross-examination of these women by petitioner's counsel it was brought out that one of them procured the other to submit to sexual intercourse with Krug (1 R. 186–190, 191–193). On his own motion the trial judge struck their

testimony from the record, and admonished the jury to disregard it (1 R. 261–262).

In the early evening of April 18, Stephan brought Krug back to his own restaurant where Krug was served dinner (1 R. 73, 154). While Krug was sitting at the table, Mr. and Mrs. Erhardt, customers known by name to Stephan, came in and talked with him about the payment of a bill (1 R. 151, 138, 142, 73). Stephan led them to Krug's table and introduced Krug as a friend from Milwaukee (1 R. 74, 138, 142–143). As soon as Krug finished eating, the waitress, Erna Schwartz, beckoned him to follow her into the back room (1 R. 145, 74, 92). She pointed to the entrance to the Field Hotel, accessible and visible from the rear door of Stephan's place (1 R. 152). Stephan had said to her that Krug should stay there that night rather than occupy a spare room in her home (1 R. 151, 158).

Krug registered under the alias Miller or Müller (1 R. 75, 133–134). Severel hours later, after eleven o'clock that night, Emmerich, the clerk, by chance saw Stephan, and told him he had "half a hunch" that a German flyer had registered at his hotel. Emmerich indicated that Stephan made a noncommittal response. (1 R. 134.)

At eight o'clock the next morning, Sunday, April 19, and by prearrangement between them, Krug appeared at Stephan's door (1 R. 75). Stephan drove him downtown where they had breakfast together, for which Stephan paid (1 R. 75–76).

They then went to the bus station, and Stephan bought Krug a ticket to Chicago (1 R. 76; but cf. 226).

At midnight Stephan was interviewed by agents of the Federal Bureau of Investigation.[3] In a statement which he signed at that time, he admitted his knowledge of Krug's identity, and his help to Krug. (1 R. 217, 218, 222–226.)

Federal officers arrested Krug at San Antonio, Texas, on May 1, 1942 (1 R. 202).

The issues submitted to the jury.—All the witnesses in the case were presented by the Government. The defense contented itself with cross-examining the Government's witnesses; it produced no witnesses itself and offered no evidence. And in the argument of defendant's counsel to the jury it was conceded that the defendant had done the various acts charged, but it was urged that he was not guilty because those acts were simply intended to help a German aviator, as an individual, and were not motivated by any purpose to aid the German Reich.[4]

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[3] See footnote 13, *infra*, p. 27.

[4] Defendant's counsel stated (1 R. 285–286):

"There is only one argument in this case, there is only one question, only one issue. What is it?

"Did this respondent, Max Stephan, when he did these things which he is charged with doing and the things which we admit that he did, was he actuated by an evil, a malicious intent to subvert the Government of our country and to aid and comfort the enemy and to adhere to the enemy?

"Did he have that evil intent? * * *

* * * * *

"The acts themselves are admitted. Whether they were overt or not is not a matter for admission. It is for you to

The issue was thus sharply drawn as to whether, from the objective facts which were not disputed, the jury could draw the inference of the forbidden purpose to aid Germany. That issue was exhaustively explored in the opposing summations, and the charge to the jury made it unmistakably clear that such an intent must be found (1 R. 332–337). Thus, in addition to the question whether there were two or more witnesses to at least one overt act, and in addition to the various formal issues (such as the citizenship of Stephan), the crucial question presented to the jury was the existence of the requisite intent. Counsel for the defendant expressly stated that he had no exception to the charge (1 R. 341).

ARGUMENT

Treason is the only crime defined by the Constitution, and is the most serious offense that can be committed against the United States. Accordingly, this case is obviously one of importance

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determine whether or not there were two or more witnesses to any one or more of these overt acts. That is for you, and it is not for me to argue, but in every one of these charges in this indictment, the paragraph winds up, 'adhering to and rendering aid and comfort to the enemy, Peter Krug.'

"It is my contention, and we have asked the court to so charge you that it is the law, before you have any right to find Max Stephan guilty of this monstrous crime with which he is charged, you must find he possessed the evil and the wicked intent, not to aid only Peter Krug, but to aid the enemy of this country of ours, the German Reich, or the state of Germany, or whatever you call it."

in the sense that it involves a crime of such magnitude. Nevertheless, we submit that the decision below is correct and that the mere gravity of the offense should not require further review.

I

Petitioner contends that the overt acts alleged and proved do not "constitute the crime of treason by adhering to, giving aid and comfort to an enemy country" (Pet. 37–41) and that under the allegations and proof he is guilty of nothing more than "giving aid and comfort for the sole benefit of an individual" (Pet. 42–43).

Petitioner's argument, we submit, is predicated upon an erroneous concept o fthe essential elements of the crime of treason. It is clear that the crime is made out when, as here, the Government has established (1) that the defendant owed allegiance to the United States;[5] (2) the enemy character of the person aided and comforted;[6]

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[5] This element of the crime is implicit in the constitutional provisions (*United States* v. *Wiltberger*, 5 Wheat. 76, 97), and is explicitly required by 18 U. S. C. 1. In the present case the indictment alleged "* * * Max Stephan * * * then and there being a citizen of the United States and a person owing allegiance to the United States" (1 R. 1), and the proof showed he was admitted to citizenship on June 24, 1935 (1 R. 49; Ex. 1-C).

[6] This element of the crime is stated in Art. III, sec. 3, cl. 1 of the Constitution, and in 18 U. S. C. 1, which speak of adhering "to their [of the United States] enemies, giving them aid and comfort." And it has been ruled that "On the

(3) a wilful intent to commit acts calculated to strengthen the enemy or weaken the nation to which allegiance is owed;[7] and (4) "the testimony of two witnesses to the same overt act."[8] The overt act, in and of itself does not necessarily, as petitioner assumes, constitute the crime of

breaking out of a war between two nations, the citizens or subjects of the respective belligerents are deemed, by the law of nations, to be enemies of each other." *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,271) 1034, 1035 (C. C. S. D. N. Y.), per Mr. Justice Nelson; *United States* v. *Greathouse*, 26 Fed. Cas. (No. 15254) 18, 22 (C. C. N. D. Cal.) per Mr. Justice Field; *United States* v. *Fricke*, 259 Fed. 673, 675 *et seq.* (S. D. N. Y.), per Mayer, D. J. The enemy character of Peter Krug was plainly alleged in the indictment (1 R. 1–2) and shown by the proof (1 R. 52, 53, 57, 117, 168).

[7] Though not explicitly set forth in either the constitutional or statutory provision, it has generally been held that an essential element of the crime of treason is an intent to give aid and comfort to the enemy. *United States* v. *Werner*, 247 Fed. 708, 709 (E. D. Pa.); *United States* v. *Fricke*, 259 Fed. 673, 676 (S. D. N. Y.); cf. *United States* v. *Burr*, 25 Fed. Cas. (No. 14692h) 52, 54 (C. C. D. Va. 1807); *United States* v. *Burr*, 25 Fed. Cas. (No. 14693) 55, 90 (C. C. D. Va.). See *United States* v. *Robinson*, 259 Fed. 685, 690 (S. D. N. Y.). See also Warren, *What Is Giving Aid and Comfort to the Enemy?*, 1918, 27 Yale L. J. 331, 343–345.

[8] Constitution, Art. III, sec. 3, cl. 1.

Petitioner asserts categorically that the Government "failed to produce two witnesses to any same overt act" (Pet. 71–73). As the court below held, however, at least several of the overt acts alleged were proved by two witnesses. Both Krug and Mrs. Bertelmann testified to Stephan's escorting Krug from Mrs. Bertelmann's house to his car. (1 R. 61, 171; overt act 3.) Again, Haller and

treason; if it did, the prosecution would be required to prove the entire offense by two witnesses, which is obviously more than the Constitution requires.

Moreover, the overt act, standing by itself, may appear to be wholly innocent. See *United States* v. *Fricke*, 259 Fed. 673, 677 (S. D. N. Y.). Thus, the dispatch of a letter to the enemy containing secret military information, or the shipment of supplies intended for the enemy would certainly constitute treason. Yet, the principal overt act in each instance, the mailing of the letter or the delivery of packages to a common carrier, is plainly one that has no outward appearances of treason. Only the intention and surrounding circumstances, not apparent to the naked eye, render the act one of treason. And the intent may be proved by any relevant evidence.[9]

Krug testified to the incident at Haller's place, where Stephan concealed Krug's identity (1 R. 66, 128; overt act 7). Mr. and Mrs. Erhardt proved that he concealed Krug's identity at his own restaurant that evening by referring to him as a friend from Milwaukee (1 R. 74, 139, 142–143; overt act 11). Petitioner does not challenge the holding of the court below that the "failure to establish all of the overt acts alleged is not fatal upon a motion for peremptory instructions" (2 R. 21), and makes no contention that the situation differs after verdict.

[9] See *Case of Fries*, 9 Fed. Cas. (No. 5,126) 826, 909, 914, 916 (C. C. D. Pa.); *Trial of David Maclane*, 26 How. St. Trials 721, 797–798; *Halsbury's Laws of England*, 2d ed. Vol. VI, p. 424. Thus the intent may be inferred from

Petitioner's principal authority for his contention that the overt act itself must "constitute the crime" is a dictum in *United States* v. *Robinson*, 259 Fed. 685, 690 (S. D. N. Y.), where doubt was expressed whether an overt act was sufficient if it did not "openly manifest any treason." The dictum was based upon an excerpt from the unreported charge of Lord Reading in the trial of Sir Roger Casement;[10] but it appears from the charge as a whole that Lord Reading was merely enunciating the familiar rule that the overt act in a treason case must be a constituent part of the

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statements antecedent, *United States* v. *Greathouse*, *supra*, pp. 24, 26; *Trial of Sir William Parkyns*, 13 How. St. Trials 63, 117–118, or contemporaneous with or subsequent to the overt act. *Respublica* v. *Roberts*, 1 Dall. 39, 40; *Trial of Ambrose Rookwood*, 13 How. St. Trials 139, 213-221. It may be proved by a confession, *United States* v. *Lee*, 26 Fed. Cas. (No. 15,584) 907 (C. C. D. C.); *Trial of Francis Willis*, 15 How. St. Trials 614, 623–625. It may be deduced from proof of knowledge which accompanied the commission of the overt act or by proof of conduct, i. e., other overt acts, which, while not alleged in the indictment, serve to illuminate the intent which may have accompanied the commission of the overt act specified in the indictment, *Respublica* v. *Carlisle*, 1 Dall, 34, 37; *Trial of Sir John Wedderburn*, 18 How. St. Trials 426, 427; *Trial of Sir Richard Grahme*, 12 How. St. Trials 645, 727–729, 740; *The Trials of the Regicides*, 5 How. St. Trials 947, 976–977.

[10] The charge is not set forth in the official report *The King* v. *Casement*, 1 K. B. [1917] 98, but may be found in "*Trial of Roger Casement*," published by William Hodge & Company, 1917, pp. 183–185. The opinions in the official report deal primarily with the question whether treason can be committed by acts perpetrated beyond the realm.

effort to help the enemy."[11] There is nothing in the charge that precludes the ascertainment of the guilty intent from evidence outside the overt act.

It is submitted, therefore, that once an overt act is established which in itself betokens assistance, it is for the jury to say from all the evidence whether it was done with treasonous intent. The overt act need not itself prove intent. That can be supplied by other factors, such as defendant's knowledge of the enemy's status and plans, or by his confession, or by other conduct, not recited in the indictment as an overt act, but which nevertheless illuminate the intent which accompanied the overt act. Measured by this rule, there would seem to be no question as to the sufficiency of the overt acts alleged and proved here by two witnesses (see footnote 8, *supra*, p. 13); for they showed that petitioner deliberately concealed

[11] See *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,272) 1036, 1037 (C. C. S. D. Ohio); *United States* v. *Greathouse*, 26 Fed. Cas. (No. 15,254) 18, 24 (C. C. N. D. Calif.); *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,271) 1034, 1035 (C. C. S. D. N. Y.); *Trial of David Maclane*, 26 How. St. Trials 721, 794–795; *Blackstone's Commentaries on the Laws of England*, Thomas M. Cooley's second edition (1872), Book IV, ch. 6, p. 345; *United States* v. *Pryor*, 27 Fed. Cas. (No. 16,096) 628, 630 (C. C. D. Pa.); *Proceedings against William Gregg*, 14 How. St. Trials 1371, 1376; *Charge to Grand Jury—Treason and Piracy*, 30 Fed. Cas. (No. 18,277) 1049 (C. C. D. Mass.); *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,270) 1032, 1033 (C. C. S. D. N. Y.); *United States* v. *Lee*, 26 Fed. Cas. (No. 15,584) 907, 908 (C. C. D. C.).

Krug's identity and gave him assistance so as to facilitate his escape and prevent its discovery.

There is no merit to petitioner's contention that the indictment fails to allege and the proof does not show anything more than that he gave aid and comfort to Krug as "an individual" and that his conduct was "devoid of the color of aid and comfort to the enemy country" (Pet. 42–43). Since Krug's status as an enemy was indisputably established (see n. 6, p. 12, *supra*), it was obviously for the jury to determine whether petitioner's conduct was intended as personal benevolence [12] without breach of national allegiance or whether it was intended to strengthen "the enemies of the United States in the conduct of a war against the United States." *United States* v. *Fricke,* 259 Fed. 673, 676 (S. D. N. Y. 1919). Opposed to petitioner's claim that he had no intent to help Germany (cf. 1 R. 287–293), the jury had before it not only Krug's testimony that

[12] Aid and comfort have been regarded as including the rendition of all types of assistance, from the obvious help of joining the enemy's forces or releasing prisoners of war or furnishing materials of war or information valuable to the conduct of the war to the more ambiguous act of engaging in commerce. *Charge to Grand Jury—Treason,* 30 Fed. Cas. (No. 18,270) 1032, 1034 (C. C. S. D. N. Y.); *Hanauer* v. *Doane,* 12 Wall. 342, 347; *Carlisle* v. *United States,* 16 Wall. 147, 150–151; *Young* v. *United States,* 97 U. S. 39, 63–64; *Sprott* v. *United States,* 20 Wall. 459, 463; East, *Pleas of the Crown* (1803), pp. 77–81; *United States* v. *Hodges,* 26 Fed. Cas. (No. 15,374) 332, 334 (C. C. D. Md.); *Charge to Grand Jury—Treason,* 30 Fed. Cas. (No. 18,272) 1036, 1037 (C. C. S. D. Ohio).

he told Stephan of his plans but also Stephan's admissions that he knew of those plans (1 R. 224, 228). The indictment charged that in giving aid to Krug, Stephan performed the specified overt acts "unlawfully, feloniously, wilfully, traitorously, treasonably, knowingly, and with intent to adhere to and give aid and comfort to the said Peter Krug." (1 R. 3.) The trial court instructed the jury that intent was a necessary element of the crime (1 R. 333, 334, 335, 336, 337, 339, 340), and that if the jury believed that petitioner had no intent to help Germany, it must acquit (1 R. 336–337). By its verdict it must now be presumed that the jury believed otherwise.

II

1. *Krug's competency as a witness.*—Petitioner contends the trial court erred in permitting Krug to testify. He asserts that Krug was incompetent (a) because he was an "infamous" person and (b) because he was an acknowledged felon. (Pet. 43–54.) Both of these contentions are without merit.

(a) Petitioner's argument is predicated on the false assumption that, within the meaning of the common law rules of competency, infamous is the equivalent of detestable, or hated, or abhorrent. At common law a proffered witness was incompetent if he had been convicted of treason, a felony, or an offense *crimen falsi,* i. e., a crime involving fraud or one that is obstructive of

justice through falsehood or fraud. Wigmore, *Evidence* (3d ed. 1940), Vol. 2, sec. 520; cf. *United States* v. *Sims,* 161 Fed. 1008, 1012 (C. C. N. D. Ala.); *Peace* v. *United States,* 278 Fed. 180 (C. C. A. 7); *Pakas* v. *United States,* 240 Fed. 350, 354 (C. C. A. 2); *Maxey* v. *United States,* 207 Fed. 327, 331–332 (C. C. A. 8). But there is nothing to indicate that a prisoner of war, because of that status, is an infamous person, and the rules of international law which require that honorable treatment be accorded him would indicate the contrary.

Furthermore, petitioner's argument that as a Nazi, Krug could have no scruple against perjuring himself in an American court, is not founded on anything in this record. His testimony, both on direct and cross-examination, give every indication that he was telling the truth.

(b) Petitioner's argument that Krug was incompetent as a witness because he was a felon, since he admitted that in connection with his escape he had prepared two fictitious letters of identification and in the course of his escape he had appropriated a rowboat, is likewise groundless. Assuming, *arguendo,* that Krug's admissions constituted a confession of the felonies of forgery and larceny, it is settled that "It is *the judgment,* and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify." Wigmore, *op. cit. supra,* sec. 521. Finally, even if Krug had been convicted of a

felony, this Court held in *Rosen* v. *United States*, 245 U. S. 467, that the common law rule which rendered a felon incompetent as a witness was no longer applicable to the trials of criminal cases in the federal courts. Cf. *Funk* v. *United States*, 290 U. S. 371.

2. *Krug's attire and conduct in the courtroom.*—Petitioner contends (Pet. 10, 55) that it was error to permit Krug to testify because he was attired in a German Army uniform and because he gave the Nazi salute. Apart from a bare mention of Krug's attire in the summations to the jury at the end of the trial (1 R. 294, 305), the record contains no evidence of Krug's uniform or alleged salute, and no objection was made at any time in that regard. Moreover, since Krug was then a prisoner of war in the custody of Canadian officials, there is nothing to show that he was not required by them to wear the uniform as distinctive clothing to impede further escape. Nor is there any suggestion that Krug was "dressed up" for the occasion. And it is at least questionable whether the Nazi salute was any more prejudicial than the answers which petitioner's counsel extracted from him on cross-examination to the effect that he was an enemy of this country and of those present in the courtroom (1 R. 109).

3. *Krug's refusal to answer certain questions.*—Petitioner contends (Pet. 11, 64) that Krug's testimony should have been stricken in its entirety because of his refusal to answer certain questions

put to him on cross-examination. The specific questions which Krug declined to answer on cross-examination, on the ground that they involved military secrets, are quoted in the opinion of the Circuit Court of Appeals (2 R. 27–28) and were concerned with how much money he had when he arrived in Detroit (1 R. 81), and how much money he had when he left Detroit (1 R. 84), where he first landed in Detroit after his escape from Canada (1 R. 87), how he was then dressed (1 R. 95), how much money he had when he arrived at San Antonio (1 R. 97), and the identity of his battalion or squadron in the German Army (1 R. 98). He also refused to reveal the address originally set forth on a certain piece of paper (1 R. 105). He had declined on direct and redirect examination to answer similar questions. (1 R. 76.)

Krug was a prisoner of war, schooled in the tradition that as such an effort at escape was a privilege and obligation (1 R. 86–87). He would not reveal any circumstance affecting his escape unless he was confident that the information sought by the question was already in the possession of the Canadian or American authorities (1 R. 84, 85, 82–83). He would not have testified to the help he received at the hands of the petitioner had he not learned before he came to court that the facts were already known (1 R. 114).

In these circumstances, we submit, Krug's testimony was properly submitted to the jury. The

authorities cited by petitioner (Pet. 66, 67, 70) suggest no departure from the rule that a witness's refusal to answer isolated questions will not require striking his testimony it its entirety except on a showing that the refusal prevented a fair opportunity to search the veracity of the witness' narrative. See Wigmore, *Evidence* (3d ed. 1940), Vol. V, sec. 1391, p. 112; *Jansson* v. *Larsson,* 30 App. D. C. 203; *Lew Choy* v. *Jim Sing,* 125 Wash. 631; *Gibson* v. *Goldthwaite,* 7 Ala. 281. Except for the broad assertion that Krug's refusal to answer "most efficiently blocked the efforts of the trial counsel" (Pet 66), petitioner makes no such showing. Furthermore, the record is clear that the defense was afforded a complete opportunity to test Krug's veracity. His testimony contains all the indicia of truthfulness. It cannot be read without the conclusion that this witness, who had a better than average capacity to observe accurately and report his observation from memory with equal accuracy, earnestly tried throughout his examination to tell the truth. The situation is not one in which a witness refuses to answer a question because of fear that the answer would reveal inconsistencies in his narrative. Nor did the refusal to answer block in any substantial way any material avenue of inquiry into the honesty of his story. Thus, the defense was not deprived of an opportunity to dispute the proof that Stephan concealed Krug's identity to the Erhardts or to Haller, by

Krug's refusal, based on claim of military privilege, to say how much money he had when he arrived at or left Detroit, or when he was arrested at San Antonio. Moreover, that petitioner was not "incurably prejudiced" as he now claims (Pet. 70), is apparent from the fact that his counsel conceded that petitioner had helped Krug in the way Krug described (1 R. 285–286).

III

Petitioner contends that he was deprived of a fair trial in consequence of the admission of several items of testimony which, it is asserted, were incompetent and prejudicial (Pet. 12–13, 56–64).

1. *The testimony relating to Von Werra.*—Krug was permitted to testify about a conversation that he had with Theodore Donay in the presence of the petitioner, relating to another German aviator, Von Werra, who had been captured, released on bail, and who escaped to Germany. Although this testimony was rather garbled it did serve as a foundation to corroborate the testimony of Rintelen, Donay's clerk, who overheard snatches of the conversation, and whose testimony was offered in connection with overt act 9 (1 R. 4, 67–69, 195–196).

2. *The so-called obscene testimony.*—Petitioner next complains of the testimony of the witnesses Ludlow and Merrifield who were called by the prosecution to show that during the course of the afternoon of April 18th, Stephan and Krug were

present together at a house on Duffield Street (1 R. 185–186, 190–191). That testimony was directed towards overt act 10, which was later stricken (1 R. 10, 261–262). Such "obscenity" as was disclosed in this connection was brought out only by the cross-examination of these witnesses and Krug by petitioner's counsel (1 R. 85–86, 186–190, 191–193.) Moreover, the trial judge struck the testimony of these two witnesses from the record and admonished the jury to give it no consideration whatsoever (1 R. 261–262).

3. *The testimony of agent Parker and the introduction of exhibits.*—The witness Parker was a special agent of the Federal Bureau of Investigation, who had been stationed at San Antonio, Texas, and had participated in the apprehension of Krug. He testified as to Krug's conversation with him, in which Krug acknowledged that he had been with Stephan in Detroit (1 R. 201–208). There were also introduced in evidence various articles which had been found in Krug's possession at the time of his arrest; these included a bus map, a revolver and cartridges, a necktie, wallet, a small bag, and a mutilated piece of paper bearing an address in Guatemala (1 R. 204–205, 198–201).

It is true that some of Parker's testimony consisted of hearsay, but regardless of whether such hearsay was admissible, there was no possibility of prejudice to the defendant: the trial judge struck it from the record, admonishing the jury

to disregard it (1 R. 258–260), and the defendant's counsel conceded to the jury that Stephan had rendered Krug the kind of assistance that Krug told Parker he had received (1 R. 285–286). Similarly, with respect to the exhibits, Stephan's counsel appeared to waive all objection; in addressing the jury he said (1 R. 285): "Now, certain exhibits have been introduced here. Those are all admitted. There is no argument about that."

4. *The admission of Stephan's signed statement.*—Finally, petitioner urges (Pet. 13, 61–64), that the trial court should have excluded Government Exhibit 17 (R. 222–226), a statement made by him to agents of the Federal Bureau of Investigation ~~following~~ about the time of his arrest and in which he recited the details of his relations with Krug. Petitioner contends only that "the reading of the statement * * * could have misled the jury to the belief that the statement as read, was a confession" and that the trial court should have "then and there" instructed the jury "that in order to convict on the charge of treason there must be a confession by the defendant in open court" (Pet 61). The statement was clearly admissible, however, as proof of petitioner's intent (*Respublica* v. *Roberts,* 1 Dall. 39, 40; *United States* v. *Lee,* 26 Fed. Cas. (No. 15,584) 907, 908 (C. C. D. C.); *Trial of Francis Willis,* 15 How. St. Trials 614, 623–625; *Case of Fries,* 9 Fed. Cas. (No. 5,126) 826, 909, 914 (C. C. D. Pa.), and the jury

was told as clearly as language could convey, that there could be no conviction except on proof of an overt act by two witnesses (1 R. 326, 327, 337, 339, 340, 341).

At the trial, petitioner objected to the introduction of his statement on two grounds: (1) insofar as it had not been shown that he was the same Max Stephan who had been naturalized in 1935, the corpus delicti had not yet been proved (1 R. 219–221), and (2) insofar as the statement was but a memorandum of a conversation, "it is not the best evidence" (1 R. 221–222). The trial court overruled both objections (*idem*), and they are not renewed here. In his brief in the Circuit Court of Appeals, petitioner suggested that the "events occurring, from the time of defendant's detention to the signing of the statement, must have so agitated the mind of the defendant as to arouse his fear and to have a definitely coercive effect" (Pet. 62). In the absence of any more specific showing, there can be no question as to the voluntary character of the statement, and we do not understand that petitioner urges the point here. Nor is any contention made that the statement should have been excluded on the ground that it was obtained while petitioner was held in illegal custody under the rule of *McNabb* v. *United States,* No. 25, this Term, decided March 1, 1943.[13]

[13] There is an intimation in the prosecutor's summation (1 R. 310) that petitioner was arrested on Sunday, April 19,

IV

Petitioner advances a variety of objections to the prosecutor's final summation which, he contends, "constituted palpably incurable error" (Pet. 74–82). We think that only three of those contentions call for discussion.

1. *The alleged statements of the prosecutor suggesting that the defendant had not taken the*

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at midnight. The facts are more fully revealed in the transcript of the formal hearing held on April 27 (1 R. 228) before Commissioner Hurd on a charge of harboring an alien within the country, upon which charge, the Department's files show, petitioner had been arraigned on April 20. For the Court's information, we have lodged a copy of this transcript with the Clerk. Bugas, agent in charge of the Detroit office of the Federal Bureau of Investigation, there testified when cross-examined by petitioner's trial counsel, that he interviewed petitioner at his restaurant around midnight on April 19. Petitioner then accompanied Bugas to his office where the interview continued and where Stephan dictated the statement. The dictation and transcription were completed by 1:30 a. m., or within one and one-half hours after Bugas first saw Stephan (Tr. pp. 41, 42). We are also informed that petitioner was not taken into custody until after he had made the statement, and the arraignment on the charge of harboring an alien occurred at 4 p. m. that day. After further investigation the present indictment was returned on June 17, and petitioner was arraigned for treason on June 20. (1 R. v.) Petitioner signed the statement, initialed each page, made a slight correction in it (1 R. 217, 218)) and at no time has he repudiated its contents. The statement is a straightforward, factual account and contains no conclusory matter. So far as acknowledgment of facts can ever occur simultaneously with apprehension, it happened here, and in view of the spontaneity of petitioner's admission, we do not believe that any of the problems presented by *McNabb* v. *United States* are involved here.

stand.—It is asserted that the prosecutor erred in suggesting that the defendant had failed to testify in his own behalf (Pet. 79). The record shows that in his plea to the jury, petitioner's counsel attacked Krug as unworthy of belief (1 R. 294–295) and suggested that it was somewhat offensive to him to see a German prisoner of war treated with courtesy in a United States district court (1 R. 283–284). In response, and in his own turn, the prosecutor asked why it was that if defense counsel knew that Krug was not telling the truth he had not called witnesses to dispute his testimony. These remarks were immediately objected to by the defense and they elicited an immediate ruling of the trial judge who told the jury not to consider this part of the prosecution argument (1 R. 304–305). As the trial court indicated at the time (*id.*), it seems clear that the prosecutor's remarks were provoked by defense counsel's argument (cf. *Crumpton* v. *United States,* 138 U. S. 361, 363–364), but even if that were not the case, it is settled that for the prosecutor to assert that testimony is uncontradicted is not the equivalent of comment on the failure of a defendant to testify in his own behalf. *Lefkowitz* v. *United States,* 273 Fed. 664, 667–668 (C. C. A. 2), certiorari denied, 257 U. S. 637; *Bradley* v. *United States,* 254 Fed. 289, 291 (C. C. A. 8); *Carlisle* v. *United States,* 194 Fed. 827, 830 (C. C. A. 4); *Robilio* v. *United States,* 291 Fed. 975, 985 (C. C. A. 6), certiorari denied, 263 U. S. 716;

Jamail v. *United States,* 55 F. (2d) 216, 217 (C. C. A. 5); *Lias* v. *United States,* 51 F. (2d) 215, 217–218 (C. C. A. 4), affirmed, 284 U. S. 584. Moreover, even if the prosecutor had trespassed against the rule, the immediate admonition from the trial judge to the jury would have cured the impropriety. *Brooks* v. *United States,* 8 F. (2d) 593, 595 (C. C. A. 9); *Cross* v. *United States,* 68 F. (2d) 366 (C. C. A. 5); *Morgan* v. *United States,* 31 F. (2d) 385, 388 (C. C. A. 7), certiorari denied, 280 U. S. 556; *Wright* v. *United States,* 108 Fed. 805, 812–813 (C. C. A. 5), certiorari denied, 181 U. S. 620; *United States* v. *DeVasto,* 52 F. (2d) 26, 30 (C. C. A. 2), certiorari denied, 284 U. S. 678; *Baker* v. *United States,* 115 F. (2d) 533, 544 (C. C. A. 8), certiorari denied, 312 U. S. 692.

Petitioner also complains (Pet. 76) of the prosecutor's statement that Krug's testimony was not only uncontradicted but was corroborated by witnesses who were friends and associates of the defendant (1 R. 305). Petitioner made no objection to the statement in the trial court (cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 238–239; *Johnson* v. *United States,* No. 273, this Term, decided February 15, 1943), but even if he had, it is settled that comment on the defendant's failure to produce witnesses is not the equivalent of comment on the failure of the defendant to testify. *Jackson* v. *United States,* 102 Fed.

473, 487 (C. C. A. 9); *Rinella* v. *United States*, 60 F. (2d) 216, 218 (C. C. A. 7); *Gargotta* v. *United States*, 77 F. (2d) 977, 978 (C. C. A. 8); *Rice* v. *United States*, 35 F. (2d) 689, 694–695 (C. C. A. 2), certiorari denied, 281 U. S. 730.

Finally, petitioner asserts (Pet. 76), the statement "to that Max made no comment" was a further effort to prejudice the jury by telling them that Stephan had not taken the stand. The record shows, however, that the excerpt taken from the prosecutor's closing argument was torn out of context, and that when considered in its proper setting, there was no suggestion whatever that Stephan had failed to take the stand. The United States Attorney was discussing Stephan's conversation with the hotel clerk Emmerich, who had testified that he told Stephan he had "half a hunch" that a German soldier had registered at the hotel. This conversation was corroborated in Stephan's own statement, where he said (1 R. 225) "To this I didn't make any comment." Taken in context, the prosecutor was simply using Stephan's own words (1 R. 311) with respect to Stephan's conversation with Emmerich. There was not the slightest suggestion pertaining to the defendant's failure to testify at the trial.

2. *The so-called inflammatory languge used by the prosecutor.*—There is complaint (Pet. 78) of the denunciatory phrase "black-hearted traitor." The Circuit Court of Appeals thought the adjective "unfortunate" (2 R. 34). The phrase was

"material to the philosophy" of the crime charged (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239), since it did no more than idiomatically characterize the offense for which petitioner was on trial. While the prosecutor may have struck a "hard blow," it was not a "foul" one (*Berger* v. *United States*, 295 U. S. 78, 88; *Viereck* v. *United States*, No. 458, this Term, decided March 1, 1943). The language used came well within permissible limits. *Di Carlo* v. *United States*, 6 F. (2d) 364, 368 (C. C. A. 2). Petitioner also stresses other language employed by the prosecutor (Pet. 16, 17, 78), which was even less objectionable.

3. *The prosecutor's reference to the death penalty.*—Lastly, petitioner complains (Pet 82) that the Government's summation carried the promise to the jury that conviction would not be followed by the imposition of a penalty of death. No such assurance can be fairly inferred from the United States Attorney's statement taken as a whole. To be sure, he did say that not all acts of treason should be punished by death (1 R. 303). The statement was made immediately after the prosecutor's reference to the fact that before being sworn as jurors they professed no prejudice against the imposition of capital punishment (1 R. 303). And it was followed also by his reminder that the question of the degree of punishment was for the judge and was not their concern (1 R. 303). The charge contains the

same admonition (1 R. 341). In that state of the record, and in the absence of any exception to his remark, there was no error in the comment. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at p. 239; *Petrilli* v. *United States,* 129 F. (2d) 101, 104 (C. C. A. 8), certiorari denied, October 12, 1942, No. 277 this Term.

V

The Circuit Court of Appeals correctly disposed (2 R. 35) of petitioner's contention (Pet. 83–87), that the charge did not adequately define the crime of treason.

The correctness and sufficiency of the charge, its accuracy in defining the crime, and its intelligibility must be determined by viewing it in its entirety. It is not necessary that the charge be composed of nicely grammatical and well-balanced sentences. The test is whether the jury understood what the judge said. And it may well be that the very homeliness of his language, more clearly than not, conveyed his meaning. He coupled his reading of the indictment with the warning that it was only a charge and proved nothing (1 R. 319, 327).[14] Certainly he defined

[14] Hence there is no merit to petitioner's contention (Pet. 88–90) that the court erred in reading the entire indictment to the jury because it contained an unproved allegation that Krug was a German "spy." Cf. *Petrilli* v. *United States*, 129 F. (2d) 101, 103–104 (C. C. A. 8), certiorari denied, October 12, 1942, No. 277, this Term.

treason within the meaning of the Constitution and the statute (1 R. 320–326). He cautioned the jury that it could not convict except on proof of an overt act testified to by two witnesses (1 R. 326, 339, 340). He gave the requested instruction, to which the defendant was probably not entitled (*Carlisle* v. *United States,* 16 Wall. 147, 154–155; *Trial of David Maclane,* 26 How. St. Trials 721), that proof of citizenship was a condition precedent to conviction (1 R. 323–325, 326, 340). He told the jury that treason could only be committed during war (1 R. 325) and that in any event it could not convict unless it had been proved, beyond a reasonable doubt, that petitioner intended to commit the crime of treason by intending to aid Germany (1 R. 332–335, 336–337, 338, 339, 340). The defendant had interposed no defense, apart from his argument that his conduct showed no more than human kindliness to Krug, that it was not conduct inspired by a motive or desire to help Germany through Krug. The jury was told that if it believed that argument, it had to acquit. The charge was clear and fair.

Moreover, the trial judge granted every instruction requested by the defendant, either in *ipsissimis verbis* or with modifications that were not objected to (1 R. 16–18), and defendant's counsel unambiguously informed the judge that he had no exception to the court's charge (1 R. 341).

VI

Petitioner's argument (Pet. 90–94) that he was prejudiced by the failure of the trial judge to sequester the jury is without merit. The trial judge offered to sequester the jury and made the offer beyond the jury's hearing so that had either side desired the jury sequestered the jurors would not have known the origin of the request which might have resulted in personal hardship to them. However, both the United States Attorney and counsel for the defendant informed the court that neither of them desired sequestration of the jury (2 R. 6). The trial judge thereafter plainly admonished the jurors that they were not to discuss the case with anyone (2 R. 7–9). Nor is this a case in which the petitioner was damaged in consequence of a tactical error by trial counsel. Such might have been the case if there were any showing that the jury was exposed to improper influence and that the opportunity for such exposure arose from his counsel's consent or request that the jury be permitted to separate during the trial. There is nothing in this record to indicate that the verdict returned reflected the jury's consideration of anything except competent proof adduced in the courtroom. In these circumstances, the Circuit Court of Appeals correctly held that there was no error in permitting the

jury to separate. *Holt* v. *United States,* 218 U. S. 245, 251; *Brown* v. *United States,* 99 F. (2d) 131, 132 (App. D. C.).

VII

Petitioner contends (Pet. 94–98) that the sentence of death was "so severe and oppressive as to be wholly disproportionate to the offense and obviously so unreasonable that it violates the substantial rights of the defendant."

Petitioner's assertion that the judgment imposes a punishment so severe that "it must be said to violate due process" (Pet. 94), is unsound since treason is the most serious crime against the United States, and since death is a statutory punishment for the crime. Cf. *Jackson* v. *United States,* 102 Fed. 473, 487 (C. C. A. 9); *Tincher* v. *United States,* 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Bailey* v. *United States,* 74 F. (2d) 451, 452–453 (C. C. A. 10). And since the sentence is within the statutory limits, an appellate court is without jurisdiction to revise it. Cf. *Ex Parte Watkins,* 7 Pet. 567, 574.

Moreover, it cannot be said that the trial court abused its discretion in the imposition of sentence. Pursuant to established practice and accepted procedure, the judge caused a pre-sentence investigation to be made (1 R. 344, 346–347; 2 R. 37). From this investigation the judge was impressed by the fact that Stephan had maintained "a haven, harbor and meeting place for

Nazi sympathizers" (1 R. 353); that the likelihood that the aid and comfort which he extended to Krug was part of a carefully executed plot to assist Krug's escape (1 R. 357–358) and that petitioner had admitted to the court, after his conviction, "every one of the overt acts and all of the actual facts charged against him" (1 R. 358). The court said (*id.*): "From his admissions alone no intelligent person could draw any conclusion except that he is a traitor to the United States, that he loves Germany, and that all that he did for Krug was done for the purpose of aiding Germany and helping Germany and the Axis win the war against the Allies." In the circumstances, the judge was satisfied that he was required to impose the maximum sentence because it was the only sentence which would serve as adequate warning to all other potential traitors (1 R. 360–361).

CONCLUSION

The petitioner presented no evidence; he simply contended that the acts done were motivated by a desire to help Krug as an individual and were not intended as assistance to Germany. The issue was thus sharply drawn as to the nature of his intent, and the jury was carefully and repeatedly instructed by the court that the mere intention to assist an individual was not sufficient. It must be presumed that the jury found the requisite intent. Moreover, at least several of the overt

acts were proved by two witnesses. Although the offense is one of extreme gravity, it is apparent from this record that the defendant was properly convicted in a fair trial. The mere seriousness of the crime does not require further review, and the Court would be fully justified in denying certiorari.

Respectfully submitted.

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